

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

R. ARDITI AND
K. ARDITI) OTA Case No. 19014262
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)**OPINION**

Representing the Parties:

For Appellants: R. Arditi

For Respondent: Diane M. Deatherage, Program Specialist III

M, GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, R. Arditi and K. Arditi (appellants) appeal an action by respondent Franchise Tax Board denying appellants' claim for refund of \$12,017.22, plus interest, for the 2017 taxable year.

The matter is being decided based on the written record because appellants waived their right to an oral hearing.

ISSUE

Are appellants entitled to abatement of the late-payment penalty?

FACTUAL FINDINGS

1. When appellants filed for an automatic extension (to October 15, 2017) to file their 2016 federal income tax return, they estimated a balance due of over \$20,000.
2. At some point prior to September 2018 appellants became aware that their income for 2017 was substantially higher than it was for the previous year and that their estimated tax payments for 2017 were probably not sufficient to cover their potential tax liability.
3. On September 6 and 7, 2018, appellants received several Internal Revenue Service (IRS) Forms 1065 (Schedules K-1).¹

¹ The Schedules K-1 were issued to The Robert Charles Arditi and Kelly Mackenzie Arditi Living Trust.

4. Appellants timely filed their 2017 California Resident Income Tax Return within the automatic extension period on October 15, 2018, reporting an underpayment of \$141,379 and penalties and interest due as of the filing date. However, appellants did not pay the balance due until two days later, on October 17, 2018, which resulted in additional amounts of penalty and interest due.
5. Respondent accepted the return as filed but recomputed the late-payment penalty and interest, and on October 29, 2018, sent appellants a Notice of Tax Return Change - Revised Balance, showing a balance due.
6. By letter from appellants' accountant dated November 5, 2018, appellants requested abatement of the late-payment penalty on the grounds that appellants received information projecting estimated long-term capital gains for 2017, but later learned that actual long-term gains were over two and one-half times greater than estimated.
7. On November 14, 2018, respondent received appellants' payment of the remaining amount due for the 2017 taxable year.
8. Respondent treated appellants' request for penalty abatement as a claim for refund and, by Notice of Action dated November 26, 2018, denied the claim.
9. This timely appeal followed.

DISCUSSION

R&TC section 19001 provides that the personal income tax “shall be paid at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).” Generally, the date prescribed for the payment of the tax is the due date of the return, without regard to extensions of time for filing. (R&TC, § 19001.) The payment due date in this case was April 15, 2018.² R&TC section 19132 imposes a late-payment penalty when a taxpayer fails to pay the amount shown as due on the return by the date prescribed for the payment of the tax.

Here, respondent properly imposed the late-payment penalty because appellants did not pay the additional amount due until October 17, 2018, and they did not completely satisfy their 2017 tax liability until November 14, 2018, almost seven months after the due date. Appellants do not dispute any of these facts or respondent's calculation of the penalty. Therefore, we find

² Because the due date was a Sunday, it was automatically extended to April 16, 2018.

that respondent correctly calculated and imposed the penalty. The next question is whether grounds exist to abate the penalty or some portion thereof.

The late-payment penalty may be abated if the taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect. (R&TC, § 19132(a)(1).) To establish reasonable cause for the late payment of tax, a taxpayer must show that the failure to make a timely payment of the tax due occurred despite the exercise of ordinary business care and prudence. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Scott* (83-SBE-094) 1983 WL 15480.) A failure to pay will be considered due to reasonable cause if the taxpayer makes a satisfactory showing that he or she exercised ordinary business care and prudence in providing for the payment of the tax liability and was nevertheless either unable to pay the tax or would suffer undue hardship if he or she paid the tax on the due date. (Treas. Reg. § 301.6651-1(c)(1); *Nasir v. Commissioner*, T.C. Memo. 2011-283.)

Appellants assert that they relied upon their tax professionals and that, despite appellants' expressed concerns that they were not making sufficient estimated tax payments to cover their probable liability, these tax professionals advised them repeatedly to not pay more in estimated taxes. In support of this argument, appellants provided copies of correspondence (emails) between them and their accountants, filing instructions to appellants for their 2017 estimated tax payments, several notifications of cash distributions to appellants by three partnerships, and a Schedule K-1 from each of those same three entities.

The common question that runs through most of the correspondence between appellants and their tax advisors is whether the accountants had all of the information they needed to calculate appellants' tax liability. That is the very question that the accountants identified in their letters to the IRS and respondent to request penalty relief, which state, in essence, that appellants received information projecting estimated long-term capital gains for 2017, but actual long-term gains were approximately two and one-half times that estimate. Appellants also ask for consideration of their request on the basis of their history of compliance.

Taxpayers have a personal, non-delegable obligation to file a tax return and pay the taxes due by the due date, and reliance on tax professionals to fulfill those obligations is not reasonable cause. (*United States v. Boyle* (1985) 469 U.S. 241, 247-248.) Nevertheless, if the evidence

establishes that (1) the taxpayer consulted with a tax professional on a question of law and provided the tax professional with all of the information needed to correctly answer the question, (2) the tax professional provided the taxpayer with legal advice on the question of law; and, (3) the taxpayer reasonably relied on that advice and otherwise exercised ordinary and reasonable care with regard to the action taken in reliance on the advice, such evidence may establish reasonable cause. (*United States v. Boyle*, *supra*, 469 U.S. at 250-251.)

Much of the correspondence appears to relate to estimated tax payments for the 2018 taxable year. That which does or could relate to the 2017 taxable year does not establish reasonable reliance on advice from a tax professional on a question of law. Instead, it shows that appellants may have been unsure about the amount of reportable capital gains. Asserted lack of documentation or difficulty in calculating a tax liability does not, by itself, constitute reasonable cause for a late payment of tax. (*Appeal of Sleight* (83- SBE-244) 1983 WL 15615.) Rather, we must examine and weigh the evidence to determine what appellants did to determine their correct tax liability. (*Frias v. Commissioner*, T.C. Memo. 2017-139, *16-17.) If, after weighing the evidence, we are persuaded that appellants exercised ordinary and reasonable care by paying the amount due on and after October 17, 2018, relief will be granted.

While our record shows that there was communication between appellants and their tax advisors concerning their 2017 taxable income, it is unfortunately devoid of the kind of specifics we would need to conclude that appellants acted as ordinarily intelligent and prudent businesspersons when they failed to accurately and timely estimate and pay their taxes. Appellants believed they were underestimating their tax liability, but they ultimately chose to rely on their tax advisors, who allege only that appellants received information from one or more partnerships grossly underestimating long-term capital gains for 2017. Appellants have not provided a copy of the initial estimates of gains provided by the partnership(s) and upon which appellants and their tax advisors chose to rely. The evidence does not show that appellants or their tax advisors made reasonable efforts to get the information appellants needed to estimate and timely pay their taxes, that such information was unavailable, and that their inability to get the information caused the late payment. Absent such evidence, we are unable to grant the requested relief. (*Appeal of Moren*, 2019-OTA-176P.) We find that appellants have failed to establish that their failure to timely pay the taxes was due to reasonable cause and was not due to willful neglect.


Regarding appellants request for relief based on their history of compliance, we recognize that the IRS may have abated a late-payment penalty under its first-time abatement program, through which the IRS abates first-time penalties based only on a taxpayer's good history of timely filings and payments. California law does not allow first-time abatement of penalties based on a taxpayer's good filing history.³

HOLDING

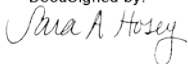
Appellants are not entitled to abatement of the late-payment penalty.

DISPOSITION

Respondent's denial of the claim for refund is sustained.

DocuSigned by:

1A9B52EF88AC4C7
Michael F. Geary
Administrative Law Judge

We concur:

DocuSigned by:

6D3FE4A9CA514E7
Sara A. Hosey
Administrative Law Judge

DocuSigned by:

0D390BC3CCB14A9
Jeffrey G. Angeja
Administrative Law Judge

Date Issued: 5/5/2020

³ The California Legislature has considered and declined to adopt bills that would change California law to allow a first-time abatement for taxpayers with a history of filing and payment compliance. (See, for example, Assem. Bill No. 1777 (2013-2014 Reg. Sess.).)